Intelligence Oversight; A judge Advocate Perspective

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- **OVERVIEW**
  - **What intelligence oversight is**
  - **Why it exists**
  - **Why judge advocates should care**
  - **The essentials**
  - **Sources of Assistance**

What intelligence oversight is

[Intelligence Oversight is a process] to enable *DoD intelligence components* to carry out *effectively* their authorized functions…

…while ensuring their activities that affect *U.S persons* are carried our in a manner that *protects the constitutional rights and privacy* of such persons.

DoD 5240.1R, Activities of DoD Intelligence Components That Affect US Persons

Why it exists…

- **It all begins here:**

"The right of the people to be secure in their persons, houses , papers, and effects, against unreasonable searches and seizures, shall not be violated…"

US Constitution, Amendment IV

A little background…

Courtesy of the Defense Intelligence Agency*

DIA Training Tape: “Intelligence Oversight”, 1st 14 min.

Why JAGs should care...

- **The General Counsel of the Air Force has responsibility for the legal aspects of Intelligence Oversight**
  - **DoD 5240.1-R**
  - **AFI 14-104**
  - **SAFO 111.5**

- **Past JA involvement in Intelligence Oversight:**
  - **Very limited**
    - **Responding to isolated questions**
    - **JAG expertise has been mostly within unique missions (e.g., AIA, AFOSI)**

- ***But*, formerly centralized issues are rapidly migrating to the field**
  - And GC doesn't have many field offices!

- **Things have changed**
  - **Expanding roles for judge advocates in operations law generally, and information operations specifically**
    - **Many operations now have intelligence oversight implications**
    - **Intelligence collection activities are an integral part of information operations**
  - **What was a closely held area -- information operations -- is now part of operational planning at Air Component levels and below**
    - **Information operations flights, and other information operators get their first tier legal advice from judge advocates in the field**
    - **Issue recognition and reporting must reliably occur at the operational level**

The General Counsel and TJAG

agree that expanded GC-JA interaction is critical

- **You won't be the OPR for intelligence oversight, but you *will* be in a position to recognize problems, help correct them and facilitate necessary reporting**
  - **Especially in the evolving "hybrid" situations found in information operations, ARC support and elsewhere**

- **Intelligence Oversight requirements apply to:**
  - **Individuals assigned or attached to organizations that could collect,analyze,process, retain or disseminate intelligence information on US Persons:**
    - **Includes organizations and staffs that do foreign intelligence, counterintelligence, intelligence preparation of the battlefield functions, and intel support to information operations**
  - **Non-intelligence personnel when doing intelligence work**
  - **Individuals who support intelligence functions, e.g.:**
    - **Computer support personnel**
    - **Contractors and consultants**

The essentials...

- **There are two principal aspects of Intelligence Oversight:**

Prevention

Correction

- **Measures to prevent violation of the constitutional rights and privacy of US Persons include:**
  - **Training**
  - **Inspections**
  - **A set of procedures and permissions**

- **Measures to correct intelligence oversight problems include:**
  - **Immediate changes as deficiencies are noted**
  - **Personnel actions as appropriate (personnel security actions; military or civilian adverse actions; contractor responsibility actions)**
  - **Reporting "Questionable activities"**

DoD personnel *must* report

“questionable activities”

Intelligence Oversight for Judge Advocates

- **"What are 'questionable activities?'", you ask.**

…any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive Order or Presidential directive, including E.O. 12333…or applicable DoD policy, including this Regulation.

DoD 5240.1-R

- **Note:**
  - **Not just violations of *intelligence* laws & rules…**
  - ***Any* potential violation of *any* law, E.O., or DoD policy related to an intelligence activity**

To whom does one report?

SAF/IG (who cross-feeds to SAF/GC)

- **See AFI 14-104, para 7.1, for details**
- **Other options: DoD IG, ATSD(IO) and DoD GC**
- **These organizations arrange for investigation, as required, and report further up to SECDEF and others**

- **If you err, err on the side of reporting**
  - **If the report wasn't necessary, AF will not report it further up the chain**
  - **Feel free to "call ahead" to SAF/GCM to discuss before initiating a report**

- **Who's to be protected from unauthorized intelligence activities?**
- **"US Persons," which include:**
  - **US Citizens**
  - **Aliens known to be permanent resident aliens**
  - **Unincorporated associations composed primarily of US citizens or permanent resident aliens**
  - **US Corporations [unless directed and controlled by foreign governments]**

- **What are US Persons to be protected from (generally speaking)?**
  - **Collection of information not properly part of the intelligence component's mission**
  - **Unauthorized collection of information about them**
  - **Retention of information about them, absent express authority**
  - **Dissemination of information about them without express authority**

- **How are they protected from inappropriate intelligence activities?**
  - **By 15, often really difficult to understand and apply, "Procedures"**

[Again, courtesy of the Defense Intelligence Agency*]

***DIA Training Tape: "Intelligence Oversight", last 8 min.**

Intelligence Oversight for Judge Advocates

- **So, what do you *really* need to remember about the "Procedures to pass the "test"?**
  - **Be wary of collection, retention, and dissemination of information involving US Persons; check for specific authority**
  - **Be wary of activities that are not clearly within the official mission of the intelligence activity**
  - **Be wary of "off duty" gathering of information**
  - **Watch for red flags: surveillance; monitoring; attendance at civilian organizational meetings; and deception about military or intelligence connections**
  - **Be wary of uses of the Internet that can be analogized to any of the above**

[Continuation of what you *really* need to remember:]

- **Be alert to any violation, related to intelligence activities, of law, executive order, or DoD policy,**
- **DoD 5240.1R**
- **AFI 14-104**
- **DSN 225-5663**

Sources of Assistance...

Intelligence Oversight for Judge Advocates

- **SAF/GCM**

  Mr Tony Wagner or Mr Kip At Lee

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  AFI 14-104 and DoD 5240.1R

- **Intelligence Law Handbook, DHS, DIA Sept 1995**
- **“Principles Governing the Collection of Internet Addresses by DoD Intelligence and Counterintelligence Components,” DoD GC (Intelligence) Letter, 6 Feb 2001**

The Test

- **Any intelligence oversight problem?**

  A Web administrator, not herself an intelligence officer but supporting an intelligence organization, decides to help out by using a spider search of the Internet to gather information about all of the people operating Web sites using Chinese words

- **Any intelligence oversight problem?**

An intelligence analyst, suspecting a colleague of arranging an affair with his wife via the Internet, unlawfully hacks from his work computer into the colleagues work computer to read his e-mail

- **Any intelligence oversight problem?**

A Reserve unit having no intelligence role is asked to assist the ACC Director of Intelligence by having its members earn extra training points by collecting open source information on organizations with a propensity to show up at protests outside ACC bases

- **Any intelligence oversight problem?**

  An intelligence officer assigned to USAFE (to a unit specializing in Russian military equipment matters) has a little extra work time, and decides to continue her passion developed in her last assignment as a drug buster at SOUTHAF: collection of all the information she can find about people involved in the drug trade

- **Any Intelligence Oversight problem?**

A conscientious intelligence officer, trying to catch up with his assigned work, uses his personal computer at home to gather information from organizational chat rooms on the Web

And consider this…

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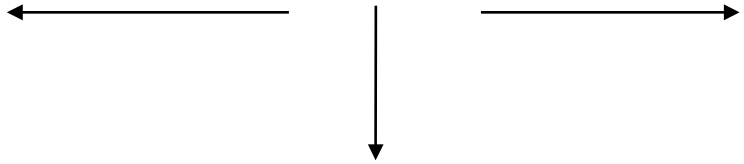
- **Consider this……**

DoD 5240.1R
5200.27*

DoDD



The Privacy Act**

*”***Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense”*** [applicable to investigative agencies re persons and organizations in the US, and US citizens anywhere]

** 5 USC § 552a

- **The basic Constitutional issues that precipitated the intelligence oversight rules is implicated in evolving *non*-intelligence and non-investigative military collection capabilities**
  - **Failure to manage our information acquisition activities appropriately could result in unworkable legislative or administrative constraints on military operations**

Questions and Comments?